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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. GONZALO CRISANTE, Defendant and Appellant.	G039797 (Super. Ct. No. 06NF3323) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

Daniel G. Koryn, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant contends the court erred when it permitted admission of evidence of uncharged crimes and when it instructed the jury with CALCRIM No. 1191. We disagree with his contentions and affirm.

I

FACTS

A jury found defendant Gonzalo Crisante guilty of continuous sexual abuse as charged in count one of the information, and returned a true finding that he was convicted in California of a violation of section 288, subdivision (a) of the Penal Code pursuant to Penal Code section 1203.066, subdivision (a)(5), habitual sex offender. The court sentenced defendant to state prison for 51 years to life.

The parties agreed to two stipulations which the court read to the jury. The first reads: "Both the People and the defendant stipulate that the defendant was arrested on the warrant that Buena Park Detective Jerry Von Gries testified that he requested be issued by a superior court judge here in Orange County. The warrant was served and the defendant was taken into custody by the Calexico Police Department on February 19, 2006, and subsequently transported to Orange County."

The second stipulation reads: "The defendant, Gonzalo Crisante, who is also known as Gonzalo Luna, was prosecuted in Los Angeles County, California, for lewd and lascivious acts with a child under 14 years under Penal Code section 288(a), under case number BA10462, the named victim in that case was [A.], and the conduct occurred in 1993 and 1994 in Los Angeles. The defendant was convicted of those charges and sentenced to state prison."

D. was born in 1998. When she testified at trial, she was eight years old. When defendant lived with D., her mother and her brother, she called him "Poppy." During questioning, the prosecutor asked D. to point to the place on a small stuffed bear when she was asked: "Now, where was Poppy touching you; what part of your body?" D. placed "her finger between the legs of the bear toward the front."

D. said defendant touched her more than one time, but she did not remember the first time or the last time. She described one time when her mother called her to eat while defendant was touching her. On that occasion, defendant "put his hand inside [D.'s] clothes."

D. remembered another time when her mother and her brother left to donate some clothes and get a haircut for her brother, she was left with defendant. She and defendant were watching television together, and defendant touched D. in her "private part."

She also described another time when she and defendant were in her mother's room, and "he was touching me, in the same spot . . . ." Defendant also kissed her on her mouth. When she said defendant took her "hand and put it somewhere" on his body, she pointed between the legs of a larger bear.

Van Nguyen Greco is a pediatrician with the Child Abuse Services Team. Nguyen said it was pertinent that D. "had severe constipation, so that about six months prior to my examination she actually required some medical intervention to help evacuate her bowels." Nguyen was given the following information about D. from the police: "The boxes were checked that there was genital or vaginal contact with penetration with a finger, and also of the anus. And there was some fondling and kissing as well. There was a narrative about the child describing that it felt cold, and was showing that the whole hand was going in, or touching her. And also touching of her breasts under her clothes." After examining D., Nguyen concluded the findings were consistent with that history.

A. is defendant's daughter. In 1993, when she was 12 years old and asleep, defendant "would touch me, like my breasts and my private areas." She said he never entered her, but that "he will be in my part, private part, but he, he never introduced it."

Defendant contends the court erred and his constitutional rights were violated when the court allowed introduction of his prior sexual offense. He also contends the court misinstructed with jury with CALCRIM No. 1191.

II

DISCUSSION

Prior bad acts

Defendant argues: "The admission of the prior sexual offense evidence violated Evidence Code section 352, as well as [defendant's] constitutional rights to due process and a fair trial."

The prosecution moved for admission of not only the prior Los Angeles conviction for defendant's acts against A., but for admission of defendant's acts against A. starting when she was seven years old, years before the family moved to Los Angeles in 1993. The trial court heard extensive argument from counsel regarding evidence of defendant's prior acts to A. The defense argued undue prejudice because A. is defendant's daughter and D. is not.

The court concluded: "As far as the argument yesterday that you made, and spent a lot of time on, indicating that the facts of the prior case are sufficiently dissimilar to the facts of the charged offenses, including the age, and what you are arguing this morning, that the prior offense involved a biological daughter . . . to the court [the situation in the charged crimes] is more analogous to a stepdaughter type of a relationship. [¶] . . . [¶] . . . I don't think the remoteness argument is too persuasive, because the defendant served a 10-year prison term after he was convicted of those crimes in '95. And that's not a long time from there until the day of this alleged offense, the beginning of October of '04. [¶] The degree of certainty of its commission and the likelihood of confusing or misleading or distracting the jurors from their main inquiry, the court feels is minimized, along with the fact of the burden for the defense in defending against the uncharged offenses, because there was a conviction of the offenses,

so that is minimizing the certainty argument, or the fact that the defense would have to essentially attack the prior uncharged offense. [¶] . . . [¶] I am not convinced with the defense argument, or I am not persuaded, I should say, that they are dissimilar. The Mexico offense does involve the same age, when she was six or seven, however, for reasons that the court is going to explain in a moment, I am not going to permit you to question the victim of the prior offense on the circumstances surrounding the Mexico incident when she was six or seven. [¶] The court feels after weighing all the factors and looking at 352, that that would be unduly prejudicial, and I think by excluding that and allowing the '94 incidents, it is a less prejudicial alternative. . . . [¶] The fact that there was no conviction in that case in Mexico, there is no other corroboration, so to speak, in that case, there is not a lot of things that in the court's eyes, in analyzing it, would take away from any distraction or confusion for the jury. It think it would lead to a lot of court time spent on cross-examination of those issues, which I think begs for the possibility of distraction or confusion . . . . [¶] . . . [¶] So although certainly the evidence is prejudicial, I mean all 1108 evidence is prejudicial. Like I said yesterday, there is no denying that. But when I look at it, I analyze it under the appropriate case law and the factors that I am supposed to analyze it under, and in looking at the facts and all the circumstances in this case, and conducting a 352 analysis, the court feels that the probative value is high of the prior offense, and it is not outweighed by any danger of substantial prejudice. [¶] So you will be permitted to bring in evidence of the 1108 evidence concerning the Los Angeles incident, the facts surrounding that incident."

In a prosecution for sexual crimes Evidence Code section 1108 specifically allows the admission of a defendant's other sexual offenses as long as the evidence is not inadmissible under section 352. Penal Code section 288 is specifically enumerated as a crime to which section 1108 applies. (Evid. Code , § 1108, subd. (d)(1)(A).) "'Evidence of a prior sexual offense is indisputably relevant in a prosecution for another sexual offense.' [Citation.] In fact, it is precisely because such evidence is so highly probative

that traditionally it has been subject to exclusion as improper character evidence in criminal trials. [Citation.] Recently, however, the 'Legislature has determined that the policy considerations favoring the exclusion of evidence of uncharged sexual offenses are outweighed in criminal sexual offense cases by the policy considerations favoring the admission of such evidence. The Legislature has determined the need for this evidence is "critical" given the serious and secretive nature of sex crimes and the often resulting credibility contest at trial. . . .' [Citations.]" (*People v. Yovanov* (1999) 69 Cal.App.4th 392, 403.)

Evidence Code section 352 gives the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (§ 352.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125; *People v. Cain* (1995) 10 Cal.4th 1, 33.) For purposes of analysis, "'prejudicial' is not synonymous with 'damaging,' but refers instead to evidence that '"uniquely tends to evoke an emotional bias against defendant" 'without regard to its relevance on material issues. [Citations.]" (*People v. Kipp* (2001) 26 Cal.4th 1100, 1121.)

People v. Harris (1998) 60 Cal.App.4th 727 (*Harris*), offers some useful guidance in evaluating a case under Evidence Code section 1108. The court suggested the following factors were relevant to evaluating the admissibility of prior sex crimes under section 1108: the inflammatory nature of the evidence, the probability of confusion, the remoteness in time of the uncharged acts to the charged crime, the

consumption of time, and the probative value of the evidence, especially as to the degree of similarity. (*Id.* at pp. 737-740.)

Here the trial judge carefully considered the inflammatory nature of the prior acts, the probability of confusion, the consumption of time, the remoteness in time of the uncharged acts as well as their probative value. The court admitted some of the proffered evidence and excluded some of it. Under the circumstances in this record, we cannot conclude the court abused its discretion.

CALCRIM No. 1191

Defendant next argues his judgment must be reversed because the trial court erred when it instructed the jury pursuant to CALCRIM No. 1191. He says the instruction was in violation of his due process.

The court instructed the jury as follows: "The People presented evidence that the defendant committed the crime of P.C. 288(a) lewd act on a child under 14 years of age that was not charged in this case. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense. [¶] Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden of proof, you must disregard this evidence entirely. [¶] If you decide the defendant committed the uncharged offense, you may but are not required to conclude form the evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision also conclude that the defendant was likely to commit and did commit continuous sexual abuse of a child under 14 years of age as charged here. [¶] If you conclude the defendant committed the uncharged offense, that conclusion is only one factor to consider along with all other

evidence. It is not sufficient by itself to prove the defendant is guilty of continuous sexual abuse of a child under 14 years. The People must still prove each element of that charge beyond a reasonable doubt. [¶] Do not consider that evidence for any other purpose except for the limited purpose of determining the defendant's credibility."

For the same reasons the same contention raised by defendant was rejected in (*People v. Johnson* (2008) 164 Cal.App.4th 731, 739-740; *People v. Reyes* (2008) 160 Cal.App.4th 246, 253 and *People v. Schnabel* (2007) 150 Cal.App.4th 83, 87, we also reject it. Defendant acknowledges the holding in *People v. Reliford* (2003) 29 Cal.4th 1007, regarding CALCRIM No. 1191's predecessor instruction "likely precludes this claim in California's courts," but says "for the purpose of preserving the claim for federal review" he makes his argument here.

III

DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

ARONSON, J.